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Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 130

JEAN RUCKER, as Guardian ad Litem of Rosa Hill,
a mentally incompetent person,

Petitioner,

v.

FIFTH AVENUE COACH LINES, INC. and
EDWARD DEVLIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Dated: May 11, 1965

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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FIFTH AVENUE COACH LINES, INC. and EDWARD DEVLIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above-entitled case on February 11, 1965 (R. 1a).

Opinions Below

The opinion of the Appellate Division, First Department, of the State of New York (R. 239-241), printed in Appendix A hereto, *infra*, pages 19-20, is reported in 19 A. D. 2d 598, 240 N. Y. Supp. 2d 619 (1st Dept. 1963). The opinion of the Court of Appeals of the State of New York, printed in Appendix A hereto, *infra*, pages 21-23, is reported in 15 N. Y. 2d 516, 202 N. E. 2d 548, 254 N. Y. Supp. 2d 97 (1964).

Jurisdiction

The original remittitur (i.e., judgment) of the Court of Appeals was entered on October 15, 1964 (R. 2a-3a; pp. 24-26, *infra*). By motion dated January 6, 1965 and returnable January 11, 1965, petitioner moved for reargument or in the alternative to amend the remittitur. By order dated February 11, 1965; the Court of Appeals denied reargument but amended the remittitur (R. 1a; pp. 27-28, *infra*).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) since a right is claimed under the United States Constitution.

Questions Presented

1. Whether the right to trial by jury in a civil case under the Seventh Amendment to the United States Constitution is applicable to the States through the due process clause of the Fourteenth Amendment.

2. If so, whether, upon the facts in this case, the action of the court below in setting aside the jury's verdict for petitioner and in dismissing petitioner's complaint constituted a denial of petitioner's right to a jury trial under the Seventh and Fourteenth Amendments.

Constitutional Provisions Involved

The constitutional provisions involved are the Seventh Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution.

The Seventh Amendment provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury,

shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The due process clause of the Fourteenth Amendment provides:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

The jury in this personal injury case unanimously returned a substantial verdict ($185,000) for petitioner (R. 217-218) and the trial judge (who saw and heard the witnesses) refused to interfere with that verdict (R. 220-222). The Appellate Division, First Department, affirmed without opinion by a 3-2 vote, the ground for the dissent being that the evidence was insufficient to establish any negligence by respondents (R. 239-241). Upon appeal, the Court of Appeals by a 5-2 vote, reversed the affirmance of the Appellate Division and dismissed the complaint upon the ground stated in the dissenting opinion of the Appellate Division, namely, "that the plaintiff [petitioner] failed, as a matter of law, to establish actionable negligence" (R. 2a-3a).

The accident in this case happened when a bus struck Rosa Hill (hereinafter "petitioner"), then 59 years old (R. 106), at Lexington Avenue and 112th Street, Manhattan, on October 27, 1959, at about 6:30 P.M. Petitioner's injuries rendered her mentally incompetent and resulted in her confinement to a mental institution, where she was confined at the time of trial, having never re-

covered to tell what had happened (R. 93-95, 110-112, 209). In fact, the accident in this case left petitioner in a "vegetable state" (R. 122) and destroyed her as a person. Of necessity, therefore, petitioner was compelled to call the bus driver, the respondent Edward Devlin, to the stand to testify concerning the accident.

The testimony of respondent Devlin, the bus driver, was as follows. Between buses there is what bus drivers call a headway—a time interval (R. 64-65). Ordinarily, he keeps his turn behind other buses (R. 62), but on the evening in question he did not because he had discharged all his passengers at 57th Street, and he was continuing on, alone in the bus, northbound (R. 45), to the car-barn (R. 62). The clutch of the bus had kept slipping and the bus was unable to carry the load of passengers (R. 62-63).

On the way back he covered as many blocks as he could with each change of the lights (R. 63). He passed plenty of buses on the way (R. 65). However, he was driving at only 15 to 20 miles per hour (R. 67).

He stopped for a red traffic light at 106th Street (R. 51). This was the last stop he made before the accident happened (R. 72).

He was familiar with Lexington Avenue (R. 42). He had been driving up and down it every day for some time (R. 42). Lexington Avenue is a narrow street (R. 43), it being stipulated that a police officer who measured the distance would testify that Lexington Avenue at 112th Street was 38 feet from curb to curb (R. 170). The terrain is level at Lexington Avenue and 112th Street (R. 44). A white line ran down the middle of Lexington Avenue at 112th Street (R. 42).

There were generally cars parked along the curb (R. 42). There was room for an automobile to be parked on either side of Lexington Avenue and also for automobiles

by way of moving traffic to go in each direction (R. 42). He would generally operate his bus close to the white line and on his side of it (R. 43). This left very little clearance, except for the space taken up by his bus, between the white line on the left and parked cars on the right (R. 43). If a person were two feet west of a car that was parked at the curb, such person would very likely be in that part of the roadway on which he would be traveling (R. 43).

The accident happened at 6:30 P.M. in the evening (R. 44). It was a clear night (R. 44) and the street lights were on (R. 53). There were parked cars on the east side of Lexington Avenue between 112th and 113th Streets (R. 50). There was no traffic coming toward him and none ahead of him close enough to be of any concern (R. 45-46).

He was about half-way down the block between 111th and 112th Streets when he first saw petitioner (R. 48). He had his headlights on (R. 53). There was nothing to obstruct his vision (R. 50). There was no parked car between him and petitioner, nor any car traveling in front of him (R. 50).

Petitioner was standing still in the roadway (R. 54) a couple of feet beyond the line of parked cars (R. 44, 47), at the easterly curb (R. 56), and north of the north crosswalk area of 112th Street and Lexington Avenue (R. 48). The north crosswalk is a continuation of the sidewalk as if there were two white lines going across the street, although there were not actually any such white lines (R. 46-47). Petitioner was north of the crosswalk by two feet (R. 49, 56).

The parked cars had their backs to him (R. 50). Petitioner was south of the first car north of 112th Street; she was not past the back or north of the back of any parked cars (R. 50). She was facing west as one would look if one were crossing from east to west (R. 46). He

first testified as noted, that petitioner was two feet farther out than the line of parked cars (R. 44, 47), which distance he later changed to a "foot or so" (R. 56).

When respondent Devlin first saw petitioner, he blew his horn (R. 54). Petitioner turned her face toward him (R. 55) and remained standing in the roadway (R. 55). Upon this occasion, he "might have" been driving a few inches over on the wrong side of the street (R. 75). He was "probably" out far enough to clear petitioner (R. 57-58). In response to a question from his own counsel, he testified that by this testimony he meant that if petitioner stood still he would clear her by moving the bus a little (R. 68). Finally, in response to the next question from his own counsel as to whether the bus would have hit petitioner if she had stood still, he answered in the negative (R. 69).

Respondent Devlin originally testified that he slowed the bus down when he first saw petitioner about a half block away (R. 55). Then when asked whether it was not true that he did not apply his brakes until he was 10 feet away from petitioner, he answered that "I don't remember" (R. 55-56). He then testified that he did not swerve the bus until petitioner was 10 feet away, when she started to move (R. 57). He continued to insist, however, that he could not remember whether or not he changed his speed before swerving the bus (R. 60). Finally, when confronted with his testimony at a motor vehicle hearing less than four months after the accident, he admitted that he had testified at such hearing that he did not change his speed until he swerved the bus (R. 61). He later testified herein that petitioner darted out in front of him (R. 69).

He went as far as he could over to the left when he swerved, far enough over onto the wrong side of the road so that at least three or four of his wheels were over there (R. 64). It would be the rear of the bus which came in contact with petitioner, because that is where he heard the

thump (R. 71). His bus was over on the wrong side of the road at the time he heard the noise of her body and the bus coming together (R. 64). The traffic lights were green for north and south traffic at the time of the accident (R. 71).

He got out of his bus after petitioner was struck (R. 59). Her body was close to the white line—about where the white line was (R. 60). She was bleeding from the head (R. 65).

In addition to respondent Devlin, petitioner called as a liability witness the police officer who responded to the accident call (R. 30). The police officer testified that respondent Devlin, the bus driver, told him that petitioner "was crossing Lexington Avenue" at the time of the accident (R. 32).

Respondent Devlin testified that his bus had air brakes (R. 73). It was stipulated that another police officer who responded to the accident call would testify that he tested the brakes and that at a speed of 20 miles an hour the bus when braked would stop in 22 feet (R. 170-171).

How Federal Question Is Presented

As noted, petitioner moved in the Court of Appeals for reargument or in the alternative to amend the remittitur. The Court of Appeals denied reargument but amended the remittitur by adding thereto the following (pp. 27-28, *infra*):

> "Upon the motion for reargument herein there was presented and necessarily passed upon an alleged question under the Constitution of the United States, viz.: Plaintiff contended that the dismissal of her complaint by this court deprived her of a jury trial as guaranteed by the Seventh Amendment to the Constitution of the United States, and therefore, constituted a denial of due process under the Fourteenth Amendment. The Court of Appeals held there was no violation of any constitutional rights."

Reasons for Granting the Writ

The within petition for certiorari asks the Court to reexamine a constitutional question of fundamental and far-reaching importance—whether the right to jury trial in a civil case under the Seventh Amendment to the United States Constitution is applicable to the States through the due process clause of the Fourteenth Amendment. The time is ripe—indeed calls—for a new review of this basic constitutional question in light of the recent decisions of the Court which have made the Bill of Rights applicable in substantial part to the States.

The instant case is particularly appropriate in which to decide such constitutional question because here a state appellate court in dismissing the complaint has reexamined and nullified the jury's verdict (a) by first finding that the accident happened in a particular manner, (b) then, based upon such finding, by simply assuming the ground upon which the jury found in its general verdict that the driver was negligent, and (c) then, by deciding that the bus driver could not be found negligent upon such presumed ground as a matter of law. What the court below thus did is to decide itself what parts of the testimony herein should be believed and then to make itself a number of inferences from the testimony it deemed to be true in order to determine what happened. This, we contend, invades the function of the jury in violation of the Seventh and Fourteenth Amendments.

I

To date, the view that the due process clause of the Fourteenth Amendment incorporates, and thus makes applicable to the States, the entire Bill of Rights—i.e., the first eight Amendments to the United States Constitution—has never been able to command a majority of this Court. Nonetheless, through the process of selective incorpora-

tion, the Court has made the Bill of Rights applicable in substantial part to the States.

Thus, in addition to its long standing decisions that the First Amendment rights of freedom of speech and of religion are part of due process and accordingly enforceable against the States, *Gitlow* v. *New York*, 268 U. S. 652 (speech and press); *Cantwell* v. *Connecticut*, 310 U. S. 296 (religion), the Court in recent years has held to be binding on the States through the due process clause of the Fourteenth Amendment the prohibition of the Fourth Amendment against unreasonable searches and seizures, *Mapp* v. *Ohio*, 367 U. S. 643; the ban of the Eighth Amendment against cruel and unusual punishment, *Robinson* v. *California*, 370 U. S. 660, the Sixth Amendment guarantee of the right to counsel in criminal cases, *Gideon* v. *Wainwright*, 372 U. S. 335, the privilege of the Fifth Amendment against self-incrimination, *Malloy* v. *Hogan*, 378 U. S. 1, and this very Term the right of an accused under the Sixth Amendment to confront the witnesses against him, *Granville* v. *Texas*, 33 Law Week 4306.

And in a recent decision in this area last Term, the Court pointedly noted that ten Justices of the Supreme Court have supported the view that due process incorporates all of the Bill of Rights, *Malloy* v. *Hogan*, *supra*, 378 U. S. at page 4, footnote 2, and further that "The Court has not hesitated to reexamine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme". *Id.*, 378 U. S. at page 5.

The Seventh Amendment right to jury trial in civil cases is one of the great guarantees of the Bill of Rights. It surely is no lesser a right than, for example, the right against unreasonable searches and seizures or the right against self-incrimination. The Court's recent decisions point unmistakably to the inclusion of this great guarantee

into the due process clause of the Fourteenth Amendment so as to make it binding upon the States, particularly where, as here, not only a substantial amount is in controversy but indeed petitioner has been literally destroyed as a person.

And, if as is contended, the right to jury trial in civil cases under the Seventh Amendment is applicable to the States through the due process clause of the Fourteenth Amendment, then it follows that the federal standard should be controlling in determining the sufficiency of the evidence to support a jury verdict. The guarantees of the Bill of Rights that have been made applicable to the States "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment . . . The Court thus has rejected the notion that the Fourteenth Amendment applies to the states only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights' ". *Malloy* v. *Hogan, supra,* 378 U. S. at page 10. To the same effect, see the recent concurring opinion of Mr. Justice Goldberg this Term in *Granville* v. *Texas, supra,* 33 Law Week at page 4309, as well as the Court's recent decision this Term in *Griffin* v. *California,* 33 Law Week 4382 (Fifth Amendment bars in state prosecution, as it does in federal prosecution, prosecutor's comment on failure of defendant to explain evidence of which he had knowledge and court's instruction that such silence is evidence of guilt).

In any event, at the very least, the right to trial by jury under the due process clause means that only the jury may permissibly decide sharply contested issues of fact which, as here, involve questions of credibility and of varying inferences from testimony.

II

A. The majority of the Court of Appeals in dismissing the complaint herein adopted the minority opinion of the Appellate Division. Such opinion assumes that petitioner was not standing in the path of the bus and that therefore the bus would have cleared petitioner if she had stood still.

However, the evidence in this case is more than sufficient to support a finding by the jury that the bus driver drove straight ahead in an undeviating line notwithstanding the fact that petitioner was standing directly in his path. It is required to follow the testimony of the driver closely upon this point.

The driver first testified that he generally drove close to the white line on his side of it (R. 43), that this left very little clearance between the bus and the parked cars (R.43), and that a person standing two feet west of the parked cars would be standing in the path of the bus (R. 43). Then, to a question as to whether it was correct that petitioner was standing two feet west of the parked car, the driver replied in the affirmative (R. 44).

After this damaging admission, a shift occurred in the driver's testimony. Although the driver subsequently repeated his testimony that petitioner was two feet west of the parked cars (R. 47), he later changed this distance from two feet to a "foot or so" (R. 56). Also the driver began to equivocate and testified that actually, upon this occasion, he "might have" been driving a few inches over the white line (R. 75) and that he was "probably" out far enough to clear petitioner (R. 57-58). Later, in response to questions from his own counsel, he testified that by this testimony he meant that if petitioner stood still he would clear her by moving the bus a little (R. 68). (The driver also testified, however, that he did not move the bus until petitioner was 10 feet away (R. 57).) Finally, in response to the next question from his own counsel as to whether the bus would have hit petitioner if she had stood still, he answered in the negative (R. 69).

Respondents argued below that this testimony by respondent driver is entirely consistent because originally the driver simply testified about his general practice and that later he testified about the actual events of the evening of the accident. (Even this explanation cannot reconcile the driver's testimony in changing the distance that petitioner was standing west of the parked cars from two feet to a "foot or so".) However, one would have had to see and hear the driver, as the jury did, to be able to say whether or not this is a plausible explanation.

Moreover, even the driver's later testimony was equivocal as to whether the bus cleared petitioner—he "might have" been driving a few inches over the white line (R. 75); he was "probably" out far enough to clear petitioner (R. 57-58); by this last statement he meant that if petitioner stood still he would clear her by moving the bus a little (R. 68) although he also testified that he did not move the bus until petitioner was 10 feet away (R. 57). Not until he was asked a leading question by his own counsel (whether the bus would have hit petitioner if she had stood still), to which the driver answered "No" (R. 69), was unequivocal testimony elicited from the driver on this point. Surely, one would have to see and hear all this, as the jury did, to decide which part of the driver's testimony to credit. And surely, such determination involves an issue of credibility which only the jury was competent to decide.

Certainly, the driver was not above being untruthful. For example, the driver originally testified that he slowed the bus down when he first saw petitioner about a half block away (R. 55). Then, when asked whether it was not true that he did not apply his brakes until he was 10 feet away from petitioner, the driver testified that "I don't remember" (R. 55-56). Subsequently, the driver testified that he did not swerve the bus until petitioner was only 10 feet away, at which time she started to move (R. 57). He continued to insist, however, that he could not remem-

ber whether or not he changed his speed before swerving the bus (R. 60). Finally, however, when confronted with his testimony at a motor vehicle hearing less than four months after the accident, the driver admitted that he had testified at such hearing that he did not change his speed until he swerved the bus (R. 61).

B. The minority opinion of the Appellate Division (adopted by the majority of the Court of Appeals) assumes not only that the bus cleared petitioner but that the jury found the driver negligent because he did not slow down. Based upon these premises, the minority decision of the Appellate Division reasons that the driver could not be expected to anticipate that petitioner would step in front of the bus and therefore was not negligent as a matter of law in failing to slow down because any other rule of conduct would paralyze traffic.

However, the jury may not have found that the driver's negligence consisted of failing to slow down. Rather, the jury may have permissibly found that the driver could have avoided the accident by moving to his left either to clear petitioner if she were standing in the path of the bus or to provide greater clearance even if she were not (it being obvious that if there were clearance such clearance consisted of only about a foot). In this connection, it was the driver's testimony that Lexington Avenue was free of other traffic at the time (R. 45-46, 50). Certainly, a movement to the left upon a street free of other vehicles involves no paralysis of traffic.

The assumption in the minority opinion of the Appellate Division (adopted by the majority of the Court of Appeals) that the jury found the driver negligent because he did not slow down is entirely speculative.

C. The jury could also reasonably have found that the respondent bus driver struck petitioner at or about the middle white line as she was crossing the street rather than that petitioner suddenly darted across the bus at the last

moment. In this connection, it should be remembered that, though the bus driver testified he was traveling with the green lights at the time of the accident (R. 71), he was significantly silent as to when the lights at Lexington Avenue and 112th Street turned green for the bus.

The bus driver told the investigating police officer immediately after the accident that he struck petitioner "while she was crossing Lexington Avenue" (R. 32). Certainly, this is far removed from the driver's testimony at the trial that petitioner "darted out in front of me" when "I was almost on top of her" (R. 69), i.e., when petitioner was 10 feet away (R. 57-58).

The location of petitioner's body further supports the conclusion that the bus struck petitioner at or about the middle white line as she was crossing the street. The driver testified that petitioner's body was about where the white line was (R. 60). And since the rear of the bus struck petitioner as the bus was swerving left or westward into the oncoming lane (R. 64, 71), the bus would have tended to propel petitioner's body eastward or back toward the sidewalk rather than westward across Lexington Avenue. Hence, the evidence is more than sufficient to support a finding by the jury that the bus struck petitioner at or about the white line as she was proceeding across Lexington Avenue rather than that petitioner suddenly darted across the bus at the last moment.

D. Upon the testimony in this case, the jury could reasonably have found that the accident happened in one of several ways. However, the court below made its own finding as to how the accident occurred and, moreover, simply assumed the ground upon which the jury found that the driver was negligent (i.e., failure to slow down). Upon its finding as to how the accident occurred and further upon its assumption as to the ground upon which the jury found the driver negligent, the court below held that the driver was not negligent as a matter of law and dismissed petitioner's complaint.

In thus dismissing the complaint, the court below has usurped the functions of the jury in violation of petitioner's right to trial by jury under the Seventh and Fourteenth Amendments. Certainly, under the federal standard of the sufficiency of the evidence or indeed under any standard of sufficiency comportable with the right to trial by jury under the due process clause of the Fourteenth Amendment, the evidence in this case was more than sufficient for the jury to determine not only how the accident happened but what the driver could have done to avoid the accident. See, e.g., *Lavender* v. *Kurn*, 327 U. S. 645; *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29. "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference." *Lavender* v. *Kurn*, *supra*, 327 U. S. at page 653.

While these cited decisions arise under the Federal Employers Liability Act, FELA decisions have been cited by the Court as representing the federal test of the sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. *Dick* v. *New York Life Insurance Co.*, 359 U. S. 437, 445, footnote 8. Indeed, these decisions upon the sufficiency of the evidence are, we submit, constitutionally mandated by the requirements of the Seventh Amendment. See, for example, the reference to "the jury's historic function" in *Lavender* v. *Kurn*, *supra*, 327 U. S. at page 652 and the statement by Mr. Justice Douglas, concurring in *Harris* v. *Pennsylvaia R. Co.*, 361 U. S. 15, 17, that "The difference between the majority and minority of the Court in our treatment of FELA cases concerns the degree of vigilance we should exercise in safeguarding the jury trial—guaranteed by the Seventh Amendment and part and parcel of

the remedy under this Federal Act when suit is brought in state courts".

It is commonly recognized that the New York courts are freer than the federal courts in taking cases away from the jury. "New York courts have generally . . . been much less inhibited than have federal courts in taking cases from the jury." Weinstein, Korn and Miller, 4 *New York Civil Practice*, § 4401.18 (1964 ed.). Indeed, "Since New York does not give excessive respect to jury verdicts, there is no reason, as there appears to be in federal cases, to use a different standard in reviewing jury and trial court determinations of fact." *Ibid.* This Court should make it clear that due process mandates that only the jury may decide sharply contested issues of fact involving questions of credibility and of varying inferences from testimony.

E. Finally, we do not have here the issue of the validity of a state rule of evidence (as distinguished from the validity of a state standard of sufficiency of evidence which issue is presented by the instant case). We have contended that the testimony of respondent bus driver was equivocal and inconsistent in several important respects and that it was for jury to determine what parts of the driver's testimony should be believed and what inferences should be drawn from such believable testimony. This contention is in accord with the established rule in New York that a party is not bound by all statements of his witness and that the jury is free to believe part of the testimony of the witness as true and disbelieve the rest, particularly where, as here, the witness is an adverse party. E.g., *Lee* v. *City Brewing Corporation*, 279 N. Y. 380, 18 N.E.2d 628 (1939); *Crellin* v. *Van Duzer*, 269 App. Div. 806, 55 N. Y. Supp.2d 590 (4th Dept. 1945); *Frey* v. *Green Bus Line, Inc.*, 259 App. Div. 891, 19 N. Y. Supp.2d 810 (2nd Dept. 1940). See Richardson, *Evidence*, § 520 (1964 ed.). The federal rule is to the same effect, *Little* v. *Littlefield*, 311 F.2d 885 (5th Cir. 1962), amended on denial of rehearing, 313 F.2d 959; *Stroud* v. *United States*, 199 F.2d 923 (5th Cir. 1952).

Nor does this case require decision by the Court as to whether all aspects of trial by jury under the Seventh Amendment are applicable to the States through the due process clause of the Fourteenth Amendment. The Court does not have before it, for example, the question whether the States may provide for verdict by less than unanimous vote of the jury or whether the States may provide a substitute for jury trial in minor civil cases.

The only question before the Court is whether in a substantial law action the Fourteenth Amendment does not require trial by jury in the state courts, and, if so, whether it is not violative of such right to trial by jury for an appellate court to reexamine and nullify the jury's verdict and to dismiss the complaint where, as here, the evidence presents a sharply contested issue of fact involving questions of credibility and of varying inferences from testimony.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the instant petition for a writ of certiorari to the Court of Appeals of the State of New York should be granted.

Respectfully submitted,

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Order of Affirmance.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 11th day of June, 1963.

Present: Hon. Benjamin J. Rabin,
Justice Presiding
" James B. M. McNally,
" Harold A. Stevens,
" Samuel W. Eager,
" Aron Steuer,
Justices.

Jean Rucker, as Guardian ad Litem of Rosa Hill, a mentally incompetent person,

Plaintiff-Respondent,

vs.

Fifth Avenue Coach Lines, Inc., and Edward Devlin,

Defendants-Appellants.

6027

An appeal having been taken to this court by the defendants-appellants from the judgment of the Supreme Court, New York County, entered on the 29th day of June, 1962, in favor of plaintiff and against the defendants in the sum of $185,755.18, and said appeal having been argued by Mr. William J. McNamara, of counsel for the appellant, and by Mr. Jacob D. Fuchsberg, of counsel for the respondent; and due deliberation having been had thereon,

It is ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed; and that the respondent recover of the appellant the costs of this appeal. (Two of the Justices dissent.)

Enter:

VINCENT A. MASSI.

Opinion of the Appellate Division.

STEUER, J. (dissenting):

I do not believe the plaintiff proved a cause of action. The accident resulted from the contact of one of defendant's buses with the plaintiff as she was crossing Lexington Avenue at 112th Street. Plaintiff was unable to testify at the trial and there were no eyewitnesses. Plaintiff had perforce to rely on the testimony of the bus driver. While the jury would be justified in drawing unfavorable inferences from his testimony, they could not base a verdict on anything except the facts he testified to. So it appears without contradiction that prior to the accident, plaintiff had stopped in the roadway, though on the crosswalk a foot or two nearer the center of the street than the row of cars parked along the curb. At a time when the bus was about ten feet from the corner and when the traffic lights were red against her, she elected to cross the street. The bus driver swerved his vehicle to the left and the front of the vehicle passed plaintiff, but contact with the side towards the rear resulted, either from its hitting her or her walking into it. At the time of contact she was at or about the center line of the roadway. The bus was proceeding within the speed limit. These circumstances do not show negligence. The claim that the driver on seeing the plain-

tiff standing out from the curb should have anticipated that she might at any time have proceeded into the street and hence into the path of his bus, and have slowed down, assumes a rule of conduct utterly at variance with street conditions and, if followed in practice, would undoubtedly so disrupt traffic that the streets would become well nigh unusable for vehicles. It is impossible to move about in this city without recognizing that a great number, if not the majority, of pedestrians wait for a change in the traffic lights not on the sidewalk but in the roadway, at about the point where cars are parked, just as this plaintiff did. If a driver would be obliged to stop or slow down to the extent that he could stop in time, his progress would be so affected at practically every corner he approached that vehicular traffic would be impeded to an intolerable extent. Common experience shows no driver does this. Unless we wish to announce one rule for liability and another, quite different, rule for practical use, the theory of liability in this case cannot stand.

The complaint should have been dismissed.

RABIN, J., concurs.

Opinion.

STATE OF NEW YORK

COURT OF APPEALS

1 No. 175

JEAN RUCKER, as Guardian ad Litem of Rosa Hill, a mentally incompetent person,

Respondent,

vs.

FIFTH AVENUE COACH LINES, INC., & ano.,

Appellants.

Order reversed and the complaint dismissed, without costs, upon the ground, fully developed in the dissenting opinion at the Appellate Division, that the plaintiff failed, as a matter of law, to establish actionable negligence. The cases cited in the opinion for affirmance are inapposite. In each of them, a question of fact as to the defendant's negligence was held to exist by reason of the undisputed proof that the operator of the vehicle failed to see the plaintiff even though the latter was in plain and unobstructed view and in the direct path of the vehicle. No opinion. All concur except Desmond, Ch. J., who dissents in an opinion in which Dye, J., concurs.

DESMOND, Ch. J. (dissenting):

Under the controlling precedents a prima facie case of negligence and freedom from contributory negligence was made out. The bus driver, seeing plaintiff standing at a

place in the street where the bus, if it stayed in its lane, would pass dangerously close to her, nevertheless proceeded on without reducing his speed or taking any other precautions. He was on notice that plaintiff had gotten herself into a position of danger. He did not know what her intentions were. Perhaps she had gotten out there just as the light changed against her or perhaps she was out there waiting for the light to change in her favor. Nevertheless and regardless of this uncertainty the driver went right ahead into the dangerous situation.

We have upheld many verdicts where the plaintiff's proof was weaker than this, as where the driver asserted—and no one could dispute him—that he never saw the pedestrian at all (see, for instance, *Clarke* v. *City of New York*, 295 N. Y. 861; *Klein* v. *Long Island R. R. Co.*, 303 N. Y. 807; *Scantlebury* v. *Lehman*, 305 N. Y. 713; *Collins* v. *Ritter*, 7 N. Y. 2d 793).

A nonsuit was not compelled here by the driver's testimony that the woman "darted" into the path of the bus. In several of the cited cases the driver's testimony that he did not and could not see the person on the tracks or in the road was uncontradicted by any direct evidence and, if believed, would show that the body suddenly appeared at the point of danger. Yet judgments for those plaintiffs were sustained on the so-called *"Noseworthy"* theory (298 N. Y. 76). In other words, where (as here) the injured or the deceased cannot testify, the verdict stands if the jury, rejecting the driver's self-exculpation, could find in the circumstances sufficient basis for a conclusion that the driver by a failure to exercise due caution caused the injury or death. Such a finding was justified here by the undisputed showing that the driver plunged ahead though he saw the woman out in the street at a point where if he proceeded ahead in his lane the clearance was as little as a foot or two.

Although we think it unnecessary here, we suggest that this verdict was justified on the "last clear chance" theory also (see *Kumkumian* v. *City of New York,* 305 N. Y. 167, and cases cited). In the present case the jury could find that the driver, after he recognized the danger of plaintiff's position, had ample time and means to avoid striking her.

In *Middlebrook* v. *Auletta* (15 N Y 2d 501, decided today) we reversed a dismissal of the complaint below and held that there was a jury question. Driver Auletta, warned of and seeing the dog in his car's path, nonetheless proceeded on without taking any precautions, then suddenly slammed the brakes on, causing injury to his passenger.

The order should be affirmed, with costs.

Remittitur.

No. 175

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 15th day of October in the year of our Lord one thousand nine hundred and sixty-four, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*
RAYMOND J. CANNON, *Clerk.*

REMITTITUR October 15, 1964.

1 No. 175

JEAN RUCKER, as Guardian ad Litem of Rosa Hill, a mentally incompetent person,

Respondent,

vs.

FIFTH AVENUE COACH LINES, INC., & ano.,

Appellants.

BE IT REMEMBERED, That on the 23rd day of April in the year of our Lord one thousand nine hundred and sixty-four, Fifth Avenue Coach Lines, Inc., & ano., the appellants in this cause, came here unto the Court of Appeals, by Stuart Riedel, their attorney—, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for

the First Judicial Department. And Jean Rucker, as Guardian ad Litem of Rosa Hill, a mentally incompetent person, the respondent—in said cause, afterwards appeared in said Court of Appeals by Fuchsberg & Fuchsberg, her attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. William J. McNamara, of counsel for the appellants, and by Mr. Jacob D. Fuchsberg, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same is reversed and the complaint dismissed, without costs, upon the ground, fully developed in the dissenting opinion at the Appellate Division, that the plaintiff failed, as a matter of law, to establish actionable negligence. The cases cited in the opinion for affirmance are inapposite. In each of them, a question of fact as to the defendant's negligence was held to exist by reason of the undisputed proof that the operator of the vehicle failed to see the plaintiff even though the latter was in plain and unobstructed view and in the direct path of the vehicle.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals

aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, October 15, 1964.

(SEAL)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

Order Amending Remittitur.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eleventh day of February A. D. 1965.

PRESENT, HON. CHARLES S. DESMOND, Chief Judge, presiding.

1 Mo. No. 92

JEAN RUCKER, as Guardian ad Litem of Rosa Hill, a mentally incompetent person,

Respondent,

vs.

FIFTH AVENUE COACH LINES, INC., and JOSEPH DEVLIN,

Appellants.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the respondent herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the motion for reargument herein there was presented and necessarily passed upon an alleged question under the Constitution of the United States, viz.:

Order Amending Remittitur.

Plaintiff contended that the dismissal of her complaint by this court deprived her of a jury trial as guaranteed by the Seventh Amendment to the Constitution of the United States and, therefore, constituted a denial of due process under the Fourteenth Amendment. The Court of Appeals held there was no violation of any constitutional rights.

And the Supreme Court of New York County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Gearon Kimball,
Deputy Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 180

JEAN RUCKER, as Guardian ad Litem of ROSA HILL,
a mentally incompetent person,
Petitioner,

v.

FIFTH AVENUE COACH LINES, INC. and
EDWARD DEVLIN,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENTS IN OPPOSITION

STUART RIEDEL,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1155

JEAN RUCKER, as Guardian ad Litem of ROSA HILL, a mentally incompetent person,

Petitioner,

v.

FIFTH AVENUE COACH LINES, INC. and EDWARD DEVLIN,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENTS IN OPPOSITION

Jurisdiction

The alleged constitutional question which petitioner seeks to have reviewed was first raised in the state courts nearly three months after the dismissal of the complaint by the New York Court of Appeals. Petitioner at that time moved for reargument or, in the alternative, for amendment of the remittitur to recite that the constitutional question here raised had been presented and necessarily passed upon.

The reargument was denied by order dated February 11, 1965, while the remittitur was amended by a second order of February 11, 1965 (R. 1-a*), which recited that on the motion for reargument the alleged constitutional question was presented and passed upon.

Questions Presented

1. Whether the Seventh Amendment guarantee of trial by jury in suits at common law is applicable, by virtue of the due process clause of the Fourteenth Amendment, to proceedings in State Courts involving only local civil issues.

2. If so, whether in the instant case the dismissal of the complaint, upon the ground that as a matter of law the evidence failed to establish actionable negligence under the law of New York, constituted a denial of petitioner's right to a jury trial under the Federal Constitution.

Statement

The plaintiff-petitioner relied entirely on one witness to establish the circumstances and facts of the accident. This was the defendant-respondent, Edward Devlin, the operator of the bus. Although Devlin had been examined before trial and his testimony reduced to a reasonably coherent deposition, no perceptible order may be found in the conduct of his direct examination by plaintiff's counsel at trial. There is a persistent skipping about, both in time and subject matter, certainly confusing if not designed to confuse. His testimony in the main must be extracted from counsel's questions. The resulting record is difficult to read and therefore to analyze.

---

* Numerals preceded by R. refer to pages in record; numerals preceded by P. refer to pages in petition for writ.

The presentation of the facts in the petition suppresses and ignores vital facts, colors and distorts others, changes words used, and resorts to partial extracts from the record and a jumbled-in-time method of presentation, with the result that although most of the facts presented are individually correct, the presentation as a whole is an obvious bid to obfuscate the factual issues of the case.

Accordingly, respondents deem it necessary to accurately and completely present the critical portions of the testimony, and to comment later on petitioner's cavalier treatment of the facts.

Devlin, the bus operator, was subpoenaed as a witness by the plaintiff (R. 41). He was queried at first about his general experience and general mode of driving under conditions usually present.

He testified he was familiar with Lexington Avenue (R. 42). The terrain is level at Lexington Avenue and 112th Street (R. 44). A white line ran down the middle of Lexington Avenue at the intersection of 112th Street (R. 42). There are generally parked cars along the curb (R. 42). There is room for an automobile to be parked on either side of the street and also for automobiles by way of moving traffic to go in each direction (R. 42). There would be very little clearance, except for the space taken up by his bus, between the white line on the left and parked cars on the right. Lexington Avenue is a narrow street (R. 43). If a person were two feet west of a car that was parked at the curb, he would very likely be in that part of the roadway on which he would be traveling (R. 43). He would generally operate his bus close to the white line and on his side of it (R. 43).

When petitioner's counsel turned to the date of the accident, Devlin testified that the accident happened at 6:30 P. M. in the evening (R. 44). It was a clear night and the street lights were on (R. 44, 53), although he does not be-

lieve that the intersection was fairly well lit (R. 53). There were parked cars on the east side of Lexington Avenue between 112th and 113th Streets (R. 50). Traffic was medium (R. 45). There was no traffic coming toward him and none ahead of him close enough to be of any concern (R. 45, 46).

He was half-way down the block between 111th and 112th Streets when he first saw the lady (R. 44, 48). He had his headlights on (R. 53). There was nothing to obstruct his vision. There was no parked car between him and the lady, nor any car traveling in front of him (R. 50). The lady was standing still (R. 54, 56) in the roadway a couple of feet beyond the line of parked cars (R. 44, 47), west of the parked cars (R. 56), and north of the north crosswalk area of 112th Street and Lexington Avenue (R. 48) at the easterly side (R. 56). The north crosswalk is a continuation of the sidewalk as if there were two white lines going across the street, although there are not actually any white lines (R. 46, 47).

She was north of the crosswalk by two feet (R. 48, 49, 56). The parked cars had their backs to him. She was south of the first car north of 112th Street; she was not past the back or further north of the back of any parked cars (R. 50). She was facing west as one would look if one were crossing from east to west (R. 46). She was a foot or so further out than the parked car that was there in the area (R. 56).

He was driving at 15 to 20 miles per hour (R. 67). He did not step on his brakes when he first saw her (R. 55). He slowed the bus down (R. 55). His later statement that he assumed he slowed the bus down was stricken (R. 55). He stated it might be so that from the time he first saw the lady until he was 10 feet from her, he did not increase or decrease his speed, he did not remember (R. 60).

When he first saw her, he blew his horn (R. 54). He saw her turn her face toward him. The lady remained standing there. She did not get out of the way (R. 55). He would clear the lady by moving the bus a little bit if she stood still (R. 68). If she stood still, his bus coming up in the general direction would not have hit her (R. 69). He might have had his wheels a few inches over the wrong side of the street before he reached within ten feet of the woman (R. 75). He was probably out further than he should have been to clear her (R. 57, 59).

The traffic lights were green for north and south at the time of the accident (R. 71).

He was almost on top of the lady, he guesses about 10 feet from her, when she started to move (R. 57, 69). The lady darted out in front of him (R. 69). She moved quickly from the front as if to cross (R. 59). He did not know she would dart out (R. 71). When he saw her dart, he swerved the bus to the left, to the west, away from the lady, and he braked it (R. 58, 69).

He went as far as he could over to the left when he swerved (R. 64); far enough over into the wrong side of the road so that at least three or four of his wheels were over there (R. 64). It would be the rear of the bus which came in contact with the lady, because that is where he heard the thump (R. 71). His bus was over on the wrong side of the road at the time he heard the noise of her body and the bus coming together (R. 64).

He got out of his bus after the woman was struck (R. 59). Her body was close to the white line—about where the white line was (R. 60).

The brakes were in good condition at the time of the accident. After the accident some police authority examined the bus. A police officer actually drove the bus, tested the brakes, and found them in good condition (R. 68).

ARGUMENT

I. The Fourteenth Amendment does not extend the right to a jury trial under the Seventh Amendment to state court proceedings involving only local civil issues.

While there has been a current of opinion that the Fourteenth Amendment was intended to make secure against state invasion all the rights, privileges and immunities protected from federal violation by the Bill of Rights

> *Chambers* v. *Florida*, 309 U. S. 227, footnote 8;
> *Gideon* v. *Wainwright*, 372 U. S. 335, 345,

this opinion has never been able to command a majority of the Court.

The Court has consistently held that the rights enumerated in the first eight amendments are not *in toto* protected against state intrusion on any theory that they are incorporated by and in the Fourteenth Amendment. Thus in *Bartkus* v. *Illinois*, 359 U. S. 121, the Court said at page 124:

> "We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such. The revelant historical materials • • • demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States."

To the same effect, see:

> *Twining* v. *New Jersey*, 211 U. S. 78.
> *Adamson* v. *California*, 332 U. S. 46.

Such of the rights and immunities of the Bill of Rights as have been held applicable to the states are those fundamental personal rights and liberties necessarily encompassed within the conception of due process of law. And it has uniformly and continuously been held that the right of trial by jury is not such a fundamental right protected by the due process clause.

Thus, in *Walker* v. *Sauvinet,* 92 U. S. 294, the Court said at pages 92, 93:

> "A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings."

In *Iowa Central Railway Co.* v. *Iowa,* 160 U. S. 389, the Court said at pages 393, 394:

> "But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided."
>
> * * *
>
> "It was not a denial of a right protected by the Constitution of the United States to refuse a jury trial * * *."

In *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U. S. 211, the Court said at page 217:

> "* * * the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same * * *."

To the same effect, see:

Hawkins v. *Bleakly*, 243 U. S. 210;
Wagner Electric Mfg. Co. v. *Lyndon*, 262 U. S. 226;
Dohany v. *Rogers*, 281 U. S. 362;
Fay v. *New York*, 332 U. S. 261.

Petitioner urges (P. 9, 10) that the recent decisions of this Court in *Mapp* v. *Ohio*, 367 U. S. 643, *Robinson* v. *California*, 370 U. S. 660, *Gideon* v. *Wainwright*, 372 U. S. 335, *Malloy* v. *Hogan*, 378 U. S. 1, and *Granville* v. *Texas*, —— U. S. ——, 33 Law Week 4306, demonstrate the Court's intent to re-examine past decisions and include the guarantee of the Seventh Amendment into the due process clause of the Fourteenth Amendment, so as to make it binding upon the states.

These cases were all criminal proceedings, where personal rights, privileges and immunities had been ridden over roughshod by the states, and where it was necessary that this Court insist that such indefensible flouting of individual rights be ended.

It is a far cry from criminal proceedings where the state is an active participant to civil suits between private litigants, where the sole function of the state is to provide the forum where, and the ground rules under which, the rights of the parties may be adjudicated.

To ever hold that the Seventh Amendment guarantee of a jury trial in civil actions applies to state court proceed-

ings involving only local issues would make the woe which followed the opening of Pandora's box seem like minor mischief indeed.

The court systems of the states would be completely disrupted, since every case involving more than $20 would command a jury trial (see Seventh Amendment), juries would have to return unanimous verdicts (the common law requirement; see *Minneapolis & St. L. R. Co.* v. *Bombolis, supra*), and the state courts could not grant summary judgments, reduce excessive verdicts or set aside obviously inadequate ones, dismiss completely groundless and unproven claims, or take any other steps which might conceivably be urged to lie within the province of the jury.

In turn, this Court would be deluged with such a plethora of applications for certiorari that the processing of them would be impossible and the storage of the records would require a building larger than the Pentagon.

These are some of the compelling practical reasons why there can be no departure from the established principle set forth in *Dohany* v. *Rogers, supra*, at page 369:

> "The due process clause does not guarantee to the citizens of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it."

II. In any event, petitioner completely failed to establish any element of liability under any applicable standard, and the complaint was properly dismissed.

The New York Court of Appeals has held that the facts established by the testimony of the bus operator (the only evidence in the entire case as to how the accident hap-

pened) failed as a matter of law to establish actionable negligence under New York law. This holding is binding upon this Court.

Erie R. Co. v. *Tompkins*, 304 U. S. 64.

Consequently, what petitioner in effect asserts is that in the absence of all evidence of actionable negligence, a jury must nevertheless be given the non-reviewable, non-reversible and inviolate power to find the existence of negligence. The mere statement of the claim suffices to show its invalidity.

But assuming, *arguendo*, that petitioner was constitutionally entitled to a jury trial and that this Court could review the evidence *ab initio*, and reach its own conclusion as to the existence of actionable negligence under a federal standard*, it is submitted that the petitioner still failed to establish any element of liability under such a standard.

1.

The bus operator's testimony, which is the only evidence in the entire case as to how the accident happened, not only completely fails to establish any negligence on the part of the defendants-respondents, but affirmatively and incontrovertibly establishes that in any event the plaintiff-petitioner was guilty of contributory negligence as a matter of law.

Devlin's testimony, briefly recapitulated, was that he was driving north on Lexington Avenue; his brakes were good, his headlights on, and his vision unobstructed; when mid-way between 111th and 112th Streets, he saw the plain-

* Even the important question as to whether in a federal court action, where jurisdiction is rested on diversity of citizenship, it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict, has not been passed upon by this Court. See *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437, 445.

tiff standing in Lexington Avenue off the curb at the northeast corner of 112th Street, about two feet north of the crosswalk, south of the first car parked north of the crosswalk, and a foot or so out beyond, i.e., west of, the line of parked cars; he sounded his horn, and the plaintiff, who was facing west, turned her face toward him, but remained standing there; he was out further than necessary to clear her, his bus would not have hit her if she stood still; when he was on top of her, about 10 feet from her, she darted out in front of him; he swerved away as far as he could and at the same time applied his brakes; the bus went over almost entirely on the wrong side of the road and he then heard a thump at the rear of the bus; afterwards she was lying close to the white center line of the street.

Clearly, no possible construction of the foregoing testimony could sustain a verdict for the plaintiff, since it not only fails to establish negligence on the part of the defendants, but establishes beyond cavil affirmative causative negligence on the part of the plaintiff.

2.

Petitioner, however, attempts in various ways to twist negligence from Devlin's story. Close scrutiny of such claims will reveal their invalidity.

(a)

Petitioner's consistent claim in the state courts was that Devlin was negligent in not having slowed down his bus or in having brought it to a halt. In line with this argument, counsel now seeks to suggest that the bus was speeding and never slowed down, since Devlin "covered as many blocks as he could with each change of lights" and "passed plenty of buses on the way" (P. 4), and since he finally, when confronted with his Motor Vehicle testimony, admitted "that he did not change his speed until he swerved the bus" (P. 6, 12, 13).

Firstly, the questions asked did not propound whether the operator was covering as many blocks as he could without regard for existing traffic regulations, nor did the answers in any way imply that he was. The direct evidence on the question is that the bus was traveling at between 15 and 20 miles per hour (R. 67), a proper and permitted speed.

Secondly, what Devlin admitted was that he had been asked and answered in the negative at the Motor Vehicle hearing a question as to whether he had changed his speed, *not from the time he first saw petitioner,* but "from the time you started to cross 112th Street" (R. 61).

Devlin testified that when he first saw the plaintiff, he blew his horn but did not step on his brakes (R. 54, 55); that he slowed the bus down (R. 55); that it might be that he did not increase or decrease his speed from the time he first saw the plaintiff until he was 10 feet from her, he did not remember (R. 60). Any suggestion that Devlin was negligent in not having slowed down his bus or in not having brought it to a halt not only proceeds on the entirely erroneous assumption that the plaintiff affirmatively proved by the foregoing testimony that the operator did not slow down the bus, but would impose a degree of care, which no reasonable man should or could be expected to exercise. The bus was traveling at no more than 15 or 20 miles per hour, well within the permitted speed; the plaintiff was standing off the curb, a foot or so further out than the line of parked cars; there was nothing behind her; when the operator blew his horn, she turned her head toward him; and the traffic lights were in favor of the bus and against the plaintiff. Under such circumstances, any requirement that a motor vehicle stop or slow down to a crawl, in anticipation of the possibility that a standing pedestrian might dart out into the path of the bus, would be ridiculous. Pedestrians, even though held from crossing by red lights or Don't Walk signs, just will not and do not stay on the sidewalk, and such a standard of care

generally imposed and observed would immobilize vehicular traffic in New York City.

As was said herein in the dissenting opinion at the Appellate Division (R. 239-241; 19 A. D. 2d 598, 240 N. Y. Supp. 2d 619), which opinion was adopted by the Court of Appeals (p. 21; 15 N. Y. 2d 516, 202 N. E. 2d 548) in reversing and dismissing the complaint:

> "* * * The claim that the driver on seeing the plaintiff standing out from the curb should have anticipated that she might at any time have proceeded into the street and hence into the path of his bus, and have slowed down, assumes a rule of conduct utterly at variance with street conditions and, if followed in practice, would undoubtedly so disrupt traffic that the streets would become well nigh unusable for vehicles. It is impossible to move about in this city without recognizing that a great number, if not the majority, of pedestrians wait for a change in the traffic light not on the sidewalk but in the roadway, at about the point where cars are parked, just as this plaintiff did. If a driver would be obliged to stop or slow down to the extent that he could stop in time, his progress would be so affected at practically every corner he approached that vehicular traffic would be impeded to an intolerable extent. Common experience shows no driver does this. Unless we wish to announce one rule for liability and another, quite different, rule for practical use, the theory of liability in this case cannot stand.
>
> "The complaint should have been dismissed."

(b)

Petitioner claims the jury could have found that the bus operator drove straight ahead in an undeviating line notwithstanding the fact that the petitioner was standing directly in his path (P. 11), and in support of such claim

asserts the operator testified that petitioner was standing two feet out beyond the parked cars (P. 6, 11, 12), that a person standing two feet out would be standing in the path of the bus (P. 11), and that he did not move the bus until petitioner was 10 feet away (P. 11, 12).

First, the operator never stated petitioner was *two* feet out from the parked cars. He simply replied in the affirmative when counsel asked if she were "a couple of feet" beyond the line of parked cars (R. 44, 47) but when the witness used his own expression, it was "a foot or so" (R. 56). Secondly, the operator did not say that in the particular situation presented at the time of the accident a person two feet out would be standing in the path of the bus, but stated, while the questions were directed to his *general* experience and *general* mode of driving under conditions *usually present,* and *before counsel even turned to the night of the accident,* that if a person were two feet out beyond a parked car, he would very likely be in that part of the roadway on which he would be traveling (R. 43). Third, Devlin never testified that he did not "move" the bus until petitioner was 10 feet away. What he did say was that he first "swerved" the bus when petitioner darted out when he was 10 feet away (R. 57). This in no way is inconsistent with the bus having previously moved over.

Devlin made it clear that he was probably out further than he had to be to clear petitioner (R. 57, 59), and when asked whether she was actually in the path of the bus, he answered categorically that his bus coming up in the general direction would not have hit her (R. 69).

In the face of this direct testimony, any argument based upon generalities at other times and distortions of the record is pointless.

(c)

Again, it is apparently argued that the jury could have found petitioner did not suddenly dart out in front of the bus, but that she was out crossing the street when the light

changed against her, and that the bus nevertheless came heedlessly on and struck her as, at the last moment, it swerved to the left to go around her (P. 13, 14). Counsel claims (P. 14) the operator was "significantly silent" as to when the lights turned green for the bus, that the story of the operator to the policeman that "she was crossing Lexington Avenue" was far removed from the driver's testimony that petitioner darted out in front of him when he was on top of her, and that the location of the body about at the center line supports this conclusion since the bus on striking the petitioner would have thrown her easterly and back toward the sidewalk.

Counsel forgets that the burden of proof was upon the plaintiff, not the defendants, and that Devlin was plaintiff's witness. If there was no answer with respect to when the lights turned green for the bus, there was likewise no question. Furthermore, what counsel means is that the witness did not testify at the trial as to when the lights turned green. Counsel for petitioner has in his possession, and used as the basis of his examination of Devlin at the trial, the sworn examination before trial of Devlin, which made it abundantly clear when the lights turned green for north-south traffic. Respondents consent to petitioner's counsel's use of such sworn testimony on this petition if he so chooses.

The fact that the police officer testified he was told petitioner was crossing from east to west proves nothing (not being evidence in chief) and in no way impeaches the operator's testimony that petitioner darted out, since the officer admitted he could not remember what the operator had told him (R. 34, 35).

Petitioner's claim that a body struck by a bus on the westerly half of the street would have been propelled in an easterly direction is completely contrary to physical laws. The actual direction which a body would take would be a resultant of the forces and directions involved. Petitioner was darting west and the bus had veered northwest. Con-

sequently, petitioner would have been propelled in a direction between northwest and north, and could not possibly have been thrown easterly.

What counsel really is suggesting is that the jury, without proof as to certain facts and because it disbelieved testimony as to other facts, could nevertheless speculate and find that the unproven facts and the opposite of the disbelieved facts were true. This, of course, is completely absurd. See the detailed discussion of this matter in subdivision 5 of this point, pages 18-20, *infra*.

3.

Even if some evidence of negligence on the part of the defendants did appear (a fact which we most strongly dispute and deny), there is still no evidence at all to show that the plaintiff was free from contributory negligence. Contrariwise, all the evidence shows that the plaintiff was guilty of contributory negligence as a matter of law.

The testimony is undisputed that the plaintiff suddenly darted out in front of the bus when the bus was only 10 feet away. It is too clear to be debatable that this was negligence of the grossest sort. If the plaintitff entered upon the path of the bus without looking she was completely oblivious of her duties. If she looked and saw and still placed herself in the position of danger she was, if anything, even more negligent, because then intention took the place of inadvertence.

4.

The petitioner is concluded by Devlin's testimony.

In calling him as a witness and relying on him to give evidence to establish her cause of action, the petitioner vouched for his reliability and credibility and could not say or show that he was unworthy of belief by impeach-

ing his credibility. All that she could do was to attempt by other evidence to contradict the facts testified to by him.

Hanrahan v. *New York Edison Company,* 238 N. Y. 194, 144 N. E. 499;
Carlisle v. *Norris,* 215 N. Y. 400, 109 N. E. 564;
Tryon v. *Willbank,* 234 App. Div. 335, 255 N. Y. Supp. 27.

However, since no other or contradicting evidence was offered, the petitioner is concluded by the testimony of Devlin, even though he is an adverse party to the action.

The applicable law is enunciated in *Hull* v. *Littauer,* 162 N. Y. 569, 57 N. E. 102, wherein the New York Court of Appeals said at pages 572 and 573:

"* * * Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising, or suspicious, there is no reason for denying to it conclusiveness. * * * In *Lomer* v. *Meker* (25 N. Y. 361), where the defense to an action upon a promissory note was usury and the indorser gave the evidence to establish it, without contradiction, it was said that 'it was the duty of the court, in such case, to dismiss the complaint, or non-suit the plaintiff, or direct a verdict for the defendants. It is a mistake to suppose that, because the evidence came from the defendant, after the plaintiff had rested, the case must go to the jury. * * * The argument is, that this could not properly be done, because there was a question of credibility raised in respect to the witness Bock, who proved the usury. But this objection is untenable. The witness was not impeached or contradicted. His testimony is positive and direct, and not incredible upon its face. It was the duty of the court and jury to give credit to his testimony.' More recently, in

Kelly v. *Burroughs* (102 N. Y. 93), Judge Danforth, after observing that, as the facts were not disputed, there was no occasion to present them to the jury, said 'the mere fact that the plaintiff, who testified to important particulars, was interested was unimportant in view of the fact that there was no conflict in the evidence, or any thing or circumstance from which an inference against the fact testified to by him could be drawn.' "

The reasoning of the court fits perfectly the case at bar. Devlin was not contradicted in any way at all, either by direct evidence or by any legitimate inferences from his testimony; and his story was not opposed to the probabilities, since it is a fact well known to the courts of New York and elsewhere that some persons either deliberately or heedlessly do run in front of moving vehicles.

Necessarily, therefore, the plaintiff was bound by the operator's testimony, which exculpates the defendants completely from any charge of negligence and brands the plaintiff with affirmative negligence of the grossest sort.

5.

Even if petitioner were not bound by Devlin's testimony, she could not recover.

Devlin's testimony is the plaintiff's entire case as to the issue of liability. If his testimony is rejected and not believed, there is no proof of anything to support a recovery.

A finding of facts must be based upon evidence. It is always the obligation of the plaintiff to establish by affirmative evidence a *prima facie* case.

> *Galbraith* v. *Busch*, 267 N. Y. 230, 196 N. E. 36;
> *Epstein* v. *Cohen*, 288 N. Y. 307, 43 N. E. 2d 56.

Disbelief in Devlin's testimony is not sufficient to establish its opposite; rejection of it does not give a jury free-

dom to conclude that something different was the fact merely by reason of the doubt.

Miller v. *Smith*, 20 App. Div. 507, 47 N. Y. Supp. 49;
Williams v. *Van Norden Trust Company*, 104 App. Div. 251, 93 N. Y. Supp. 821;
Matter of Laurence v. *Gaffney*, 272 App. Div. 609, 74 N. Y. Supp. 2d 717.

Consequently, the rejection of the bus operator's testimony would leave a vacuum within the proof and mandate dismissal of the complaint.

It is interesting to note that plaintiff's attorney blandly proceeded and still proceeds on the assumption that the plaintiff could recover solely because the bus operator was not to be believed. Both during the trial (R. 40) and not less than eight times during his summation he cast aspersions on Devlin's truthfulness and invited the jury to reject his testimony. He stated that Devlin's narrative was "mallarkey" and not to be swallowed (R. 180); that it was a "poppy-cock" story (R. 185) with something "fishy" about it (R. 184); that it had to be dragged out of him (R. 181, 182) [as if this were not the tactic deliberately employed]; and that his answers were "wish washy" (R. 182) and "evasive" (R. 183).

Not only was this tactic by trial counsel of long experience completely improper, for as the New York Court of Appeals said in *Carlisle* v. *Norris*, *supra*, at page 409:

> "* * * he could not give evidence to impeach him and of course if he could not give evidence to impeach him he could not assert without evidence that he was not to be believed.",

but it overlooked the obvious fact that rejection of Devlin's testimony left a complete void in the proof, which could not be filled by sheer speculation on the part of the jury.

It is submitted as a most basic proposition of law that a plaintiff cannot recover on the theory that her whole case as presented is not to be believed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals of the State of New York should be denied.

Respectfully submitted,

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